No. 83-700

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

JOHN A. PAWLAK and JAMES STAFFORD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTRODUCTION

Petitioner has previously argued that absent Congressional authorization, a court is not permitted to award fees based on its perceived need to facilitate enforcement of a particular statutory scheme. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). By necessity then, if this rule applies to fee awards for time spent litigating the underlying substantive claim, it must apply with equal or greater force to fee awards to attorneys for time spent attempting to collect their own fees. This is especially true, where as here, Plaintiffs' Counsel seek to justify an attorney's attorney fee award based on broad policy grounds.

ARGUMENT

FEE SHIFTING THROUGH AN AWARD OF ATTORNEY FEES FOR TIME SPENT LITIGATING THE ADEQUACY OF A FEE APPLICATION CAN ONLY BE PERMITTED WHERE THERE IS EXPRESS CONGRESSIONAL AUTHORIZATION AND/OR WHERE AN EXCEPTION TO THE "AMERICAN RULE" APPLIES

As this Court clearly set forth in its decision in *Alyeska Pipeline Service Co. v. Wilderness Society, supra,* 421 U.S. 240, absent statutory authority, the "American Rule" requires prevailing parties to pay their own attorneys' fees unless one of the common law exceptions applies to the factual situation presented. Such a restrictive rule is necessary so as to prevent federal courts from:

> fashion[ing] drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not others, depending upon the courts' assessment of the importance of the public policies involved in particular cases. 421 U.S. at 269.

While Respondents accept the conclusion that *Alyeska* precludes an award of fees for time spent litigating the merits, absent statutory authorization, they suggest, nevertheless, that they are permitted to receive fees for time spent litigating the fee application.[1] Respondents' Memorandum In Opposition at 7.

Respondents' narrow construction of *Alyeska* is inconceivable and invites the parties and the courts to engage

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[1] It is uncontested that the LMRDA does not provide for a statutory entitlement to fees in this action. Rather, any fee award must be based on the "common benefit" doctrine. There has been at least one effort to amend Title I of the LMRDA to statutorily provide for entitlement to attorney fees. See S. 1983, 95th Cong., 1st Sess. (1977).

in the same policy analysis that the *Alyeska* Court expressly rejected. Certainly, the *Alyeska* Court would not suggest that the courts must refrain from engaging in the "assessment of the importance of the public policies," 421 U.S. at 269, involved in the merits of a case in awarding fees and then permit that same balancing of public policies in deciding whether to award fees for time spent litigating a fee application. In that regard, attention should be directed to Respondents' central policy theme, namely:

> If the federal courts lack power to require unions to pay a reasonable fee for the time spent by attorneys in Title I cases, the odds against member suits brought to vindicate their democratic rights would mount, and the Title I Bill of Rights for union members would become largely illusory. Respondents' Memorandum In Opposition at 10.

To protect this policy concern, Respondents suggest that this Court permit nonstatutory fee shifting to, from their viewpoint, "even up the sides" by providing an incentive for attorneys to represent private litigants. Respondents' Memorandum In Opposition at 8-9. Thus, Respondents' emphasize that they need fee awards to "attract the type of competent counsel required to litigate Title I cases against union attorneys who are well versed in labor law." Respondents' Memorandum In Opposition at 9. Additionally, Respondents believe that such an award of fees is necessary so that the "courts create incentives for unions to attempt to settle fee petitions rather than fight them." (citation omitted) Respondents' Memorandum In Opposition at 9.

Respondents' extensive presentation of policy arguments invites and requires what the *Alyeska* Court precluded, i.e., requiring the courts to balance the countervailing policy arguments. Under this approach, Petitioner must suggest contrary public policies that argue against an award of fees for fee application litigation.

In this regard, it must be emphasized that it is the fiduciary duty of this Union to safeguard the assets of its members in the union treasury. As clearly vindicated in proceedings below, this Petitioner opposed the fee application because it was based on documentation that was wholly inadequate and abysmal by any standard. App. 11a-21a. Unions, as with any other litigant, should not be required to settle fee applications that do not merit such settlement. As this Court previously noted, "one should not be penalized for merely defending . . . a lawsuit. . ." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

Where there is evidence that the failure of a party to settle is in bad faith or for purposes of delay, there is an established common law exception that provides for fee awards. *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974). In fact, Respondents had argued "bad faith" as an independent basis for an award of fees. App. 43a-44a. That argument was rejected. App. 44a.

This Court should reaffirm its consistent position, as stated in *Alyeska*, that the judiciary should not "pick and choose" statutes that it believes should be facilitated through awards of attorneys' fees on the merits and for fee application litigation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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